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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 30

MERCHANTS NATIONAL BANK OF BOSTON,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 26–32) is reported in 45 B. T. A. 270. The opinion of the United States Circuit Court of Appeals (R. 63–69) is reported in 132 F. 2d 483.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 30, 1942 (R. 69). The petition for a writ of certiorari was filed on

March 29, 1943, and granted on May 3, 1943 (R. 70). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a charitable bequest in remainder of the corpus of a testamentary trust is deductible for estate-tax purposes under Section 303 (a) (3) of the Revenue Act of 1926, as amended, and the applicable Treasury Regulations, where the trustee is empowered to invade the corpus for the "comfort, support, maintenance and/or happiness" of the life beneficiary, the testator's wife.

2. Whether, in these circumstances, a capital gain realized by the trust is deductible in computing net income under Section 162 (a) of the Revenue Act of 1936, as income "which pursuant to the terms of the will * * * is * * * paid or permanently set aside" for charitable purposes.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 303 [as amended by Sec. 403 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680]. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

* * * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, *which pursuant to the terms of the will* or deed creating the trust, is during the taxable year paid or *permanently set aside* for the purposes and in the manner specified in section 23 (o), or is *to be used exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; [Italics supplied.]

* * * * * *

Treasury Regulations 80 (1934 Ed.):

> ART. 44. *Transfers for public, charitable, religious, etc., uses.*— * * *
>
> If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *
>
> * * * * * *
>
> ART. 47. *Conditional bequests.*— * * *
>
> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 27–29) may be summarized as follows:

Ozro M. Field, testator, died in 1936 leaving a gross estate of $366,527.66, which included property in the amount of $52,718.75 held jointly by him and his wife, who survived him. She was sixty-seven years of age at the date of his death. Immediately after his death the widow owned income-producing property worth about $104,000 as

well as tangible personal property and a country home in Buckland, Massachusetts. They had no children but during a previous marriage Mr. Field had adopted two girls and a boy. In 1936, the girls were married to husbands fully able to support them and the boy was nearly twenty-one years of age. (R. 27.) Mr. and Mrs. Field made wills simultaneously leaving the remainder interests of their estates to charity (R. 28).

Under the terms of the residuary trust of the decedent's will, the trustee was to pay the net income to Mrs. Field for her natural life (R. 53), with the right to pay to or for her benefit (R. 54)—

> such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon her death, all of the corpus of the trust except $100,000 was to go to named charities; the $100,000 was to be retained in trust for the benefit

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of the three adopted children and a niece of Mrs. Field, and as each such beneficiary died, his or her share was to go to named charities (R. 27–28). The widow's ordinary living expenses since the death of her husband (excluding taxes, nonrecurring expenses, or large amounts expended for such purposes as traveling, gifts, automobiles, etc.) have averaged between six and seven thousand dollars a year (R. 28), and during this period she has been able to save excess income of about $40,000 (R. 29, 44–45).

In 1937 the estate realized capital gains from the sale of certain stocks held in the trust in the amount of $100,900.31, and claimed a deduction in its income tax return under Section 162 (a) of the Revenue Act of 1936, on the ground that this amount had been permanently set aside for the charities named in the will. This was disallowed by the Commissioner. (R. 29.) He also disallowed a deduction of $128,276.94 in the estate tax return with respect to the gift of the remainder to charity, on the ground that the power of the trustee to invade the corpus of the trust made it impossible to determine the amounts which the charitable legatees would receive (R. 23–24).

The Board of Tax Appeals, with four members dissenting, decided that the possibility of invading the corpus was sufficiently remote to justify the deduction of the charitable bequest from the gross estate and the capital gain from

gross income. The Commissioner appealed to the Circuit Court of Appeals, which reversed the decision of the Board on the ground that since the requirements of the life tenant are unmeasurable and the possibility of invasion of the corpus exists under the language of the trust instrument, the amounts going to the charitable legatees are uncertain and unascertainable at the death of the testator and cannot be deducted from the gross estate.

SUMMARY OF ARGUMENT

I

Under the terms of the decedent's will the trustee was authorized to pay to Mrs. Field or for her benefit such sums from the principal of the trust as it might deem wise for her "comfort, support, maintenance, and/or happiness." and the trustee was admonished to exercise its discretion with "liberality" to her and to "consider her welfare, comfort and happiness prior to claims of residuary beneficiaries." Since the requirements for her "happiness," either present or future, may extend over an exceedingly wide range, there is obviously no way of ascertaining to what extent, if at all, the charitable remainders will ever take effect. The decedent has thus failed to make a charitable bequest capable of being measured by any known standards in terms of money, and it seems plain that Congress never in-

tended to allow the deduction in such circumstances. If the question were open to doubt, it would be resolved by Treasury Regulations which have been continuously in effect for over twenty years and which govern this precise issue. Article 47 of Regulations 80 provides that "If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it * * * not deductible had it been directly so bequeathed * * *, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." These regulations are a reasonable construction of the statute; they have been in effect and have been the basis for administrative action for a long period of time; they should not now be overturned.

II

In 1937 the trust realized a capital gain of $100,900.31 which was added to corpus and became subject to the same hazards of diversion for Mrs. Field's benefit as are discussed above in Point I. That gain is therefore not exempt from income tax under Section 162 (a) of the Revenue Act of 1936 which allows as a deduction the income "which pursuant to the terms of the will * * * is * * * permanently set aside" for charitable purposes.

ARGUMENT

I

SINCE THE AMOUNTS WHICH MAY BE PAID TO THE LIFE BENEFICIARY UNDER THE TERMS OF THE TRUST CAN NOT BE MEASURED AND THERE IS A POSSIBILITY THAT THE CORPUS OF THE TRUST MAY BE INVADED, THE BEQUESTS TO CHARITY ARE NOT DEDUCTIBLE FROM THE GROSS ESTATE UNDER SECTION 303 (a) (3) OF THE REVENUE ACT OF 1926, AS AMENDED, AND THE APPLICABLE TREASURY REGULATIONS

1. The decedent, a resident of Massachusetts, bequeathed the remainder of his estate to certain charities subject to a life estate in his wife, with power in the trustee to pay for the benefit of his wife such sums from the principal of the trust fund as the trustee shall in its sole discretion deem proper for the comfort, support, maintenance, "and/or happiness" of his wife. The decedent in his will expressly admonished the trustee to exercise its discretion with "liberality" to his wife, "and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries" under the trust. (R. 53–54.) It should not be necessary to labor the argument that under the terms of the decedent's will, there is no method of ascertaining how much of the principal the trustee will use in any one year for the benefit of decedent's wife. Assuming that one could reduce the amount necessary for the wife's comfort, support, and maintenance in any year to a fixed sum, there

is no means by which one could ascertain how much of the principal would be necessary for her "happiness."

The decedent's wife might indicate to the trustee that a new automobile, a fur coat, a trip abroad, a substantial gift to a relative might make her happy. Indeed, the Board found that such expenditures were in fact made: $855 for an automobile and later $1,435 for another, $2,250 for a mink coat, $1,600 for two trips, $700 to help her niece when her husband died, $1,500 to help the niece's son finish medical school, and an undisclosed amount for a fur coat for one of her husband's adopted children (R. 28–29). Under the terms of the will it was impossible to say how much of the principal the trustee would pay for the wife's benefit during any year of the remainder of her life. Mrs. Field owned a country home at Buckland which had been purchased in earlier years for only $3,000 (R. 42); conceivably, she might regard it as necessary to her happiness at some later time to acquire a less modest estate that would be more commensurate with her potential resources. The range of her possible future expenditures is exceedingly wide and it is unimportant that it is her *present* intention to confine her expenditures within narrow limits. The critical consideration is that, under the terms of the will, the corpus may be invaded virtually at the whim of the widow, which cannot presently be forecast,

and that it is therefore impossible to assign any value to the charitable remainder. Moreover, the wholly conjectural nature of the widow's possible future demands against corpus is underscored by the relatively narrow gap in 1940 between her expenditures of $13,389.31 and the combined income from her own property and the trust in the amount of $16,959.66 (R. 28). Certainly, a trust in which the widow was given the uncontrolled power to revoke charitable remainders could not satisfy the statute, even though the widow were to testify that she had no intention of exercising that power, for actual control over property has always been regarded under the revenue laws as equivalent to ownership.[1] And under the terms of the decedent's will, the charitable bequests were subject to substantially the same hazards of divestment.

Under the decisions of the courts of the state in which the decedent was a resident at the time of his death, the words "comfort and happiness"

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[1] Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; *Burnet* v. *Guggenheim*, 288 U. S. 280; *Porter* v. *Commissioner*, 288 U. S. 436; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Chase National Bank* v. *United States*, 278 U. S. 327; *Corliss* v. *Bowers*, 281 U. S. 376; *Helvering* v. *Horst*, 311 U. S. 112, 119. See also *Helvering* v. *Stuart*, 317 U. S. 154, 170–171; *Altmaier* v. *Commissioner*, 116 F. 2d 162, 165 (C. C. A. 6th), certiorari denied, 312 U. S. 706; *Kaplan* v. *Commissioner*, 66 F. 2d 401, 402 (C. C. A. 1st); *Rollins* v. *Helvering*, 92 F. 2d 390, 395 (C. C. A. 8th); *Esty* v. *United States*, 63 C.Cls. 455, 462–463; *Helvering* v. *Evans*, 126 F. 2d 270, 272–273 (C. C. A. 3d), certiorari denied, 317 U. S. 638, rehearing denied, 317 U. S. 706.

have been construed to cover mental satisfaction as well as physical comforts. See *Dana* v. *Dana*, 185 Mass. 156; *Griffin* v. *Kitchen*, 225 Mass. 331.[2]

In *Dana* v. *Dana, supra*, the testator gave his wife the residue of his estate for life, with power (p. 157)—

> to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever—

with the reversion, if any, to certain others. It appeared that the widow spent part of the principal during her lifetime for charitable purposes, and the question was whether her executors must make good that amount. The court held that under the will the widow had full power, not only to use the income, but also to expend the principal, either in whole or in part, as she might deem advisable for her own personal welfare and enjoyment. The court said (p. 159):

> That she had a private fortune of her own, amply sufficient for her support, does not change the legal force of the language employed by the testator, or cut down his clearly expressed intention, by making his purpose depend in any degree upon the fact that she possessed a separate estate.

[2] The law of Massachusetts would seem to control the construction of the decedent's will because he was a resident of Massachusetts on the date of his death. *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 F. 2d 710 (C. C. A. 2d).

No such limitation is imposed by him; neither was it his design to restrict her to the use of only so much of the principal as might be necessary for her comfortable physical support and existence.

The power of disposal given to her was not for this object alone, though undoubtedly it was in the mind of the testator, and is included in the language used by him. But in addition, she was to spend and enjoy it in the largest manner for her happiness, and nothing appears in the record to raise the suggestion, that in her use of the property, Mrs. Greenleaf wished to deplete the estate of her husband, in order to preserve or increase her own.

If through reasons of religion or of benevolence, and for her mental satisfaction, she chose to devote any part of the estate left to her, in aid of either charitable or philanthropic objects, there is nothing in the terms of his will that restricts her from making such use of the principal; and if the testator did not care to confine her discretionary powers, there is no duty incumbent on us to seek for reasons to limit their exercise.

It is entirely possible that the widow herein might become displeased with the designated charitable recipients and wish to divert the funds to some other worthy cause which may or may not qualify as a charity under the statute. But the deduction for estate tax purposes should be allowable only

if it can satisfy the statutory requirement as of the date of the decedent's death. If the deduction herein were allowed and the funds subsequently diverted to the widow's personal uses or to some noncharitable purpose after the running of the period of limitations, we are aware of no method whereby the Treasury could recover the full tax. It is therefore all the more important that the charitable bequest must qualify for the deduction as of the date of death, and if it is subject to divestment by conditions that cannot be measured it should not be allowable.

Obviously the statute is not designed to permit a deduction for the bequest of a fund which may be used indifferently for charitable and noncharitable purposes. It is only the value of the testator's bequest to charity that is deductible (*Taft* v. *Commissioner*, 304 U. S. 351) and the amount of the bequest must be ascertainable at the date of death. *Humes* v. *United States*, 276 U. S. 487; *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. It follows that where the testator has bequeathed property in trust with a remainder to charity, but has given the trustee power to invade the corpus for the benefit of the life tenant, no deduction is allowable unless the power of invasion is restricted by standards that are capable of being measured in terms of money so that the value of the charitable remainder can be ascer-

tained. This is the construction placed on the statute by the regulations.

2. Two provisions of the regulations bear directly upon this issue. Articles 44 and 47, Regulations 80 (1934 Ed.). Article 44 provides generally:

> If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

Moreover, Article 47 unambiguously covers this very case:

> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The foregoing provisions have been in effect over a long period of years. Article 44 goes back at least to the regulations promulgated under the Revenue Act of 1921,[3] and the provisions of Article

[3] See Article 47, Regulations 63 (1922 Ed.); Article 44, Regulations 68 (1924 Ed.); Article 44, Regulations 70 (1925 and 1929 Eds.). The validity of these provisions has been upheld in *Burdick* v. *Commissioner*, 147 F. 2d 972, 974 (C. C. A. 2d), certiorari denied, 314 U. S. 631.

47 have been in effect continuously for an even greater number of years.[4] The applicable statutory provisions, to the extent relevant, have remained substantially unchanged during this entire time.[5] These regulations should be sustained unless plainly inconsistent with the statute. *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760, 763; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100, 101–103. And they derive even greater strength from the repeated reenactments of the statute. *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301, 307–308; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466–467; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Morgan* v. *Commissioner*, 309 U. S. 78, 81; *Reinecke* v. *Smith*,

[4] Article 56, Regulations 37 (1919 and 1921 Eds.); Article 50, Regulations 63 (1922 Ed.); Article 47, Regulations 68 (1924 Ed.); Article 47, Regulations 70 (1926 and 1929 Eds.).

[5] Section 303 (a) (3) of the Revenue Act of 1926, *supra*; Section 303 (a) (3) of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 403 (a) (3) of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 403 (a) (3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

289 U. S. 172, 175. See, particularly, *Taft* v. *Commissioner*, 304 U. S. 351, 355–357, where this Court sustained cognate regulations with respect to Section 303 (a).

Applying the statute and regulations[6] to this case, the charitable bequests were not deductible because they were wholly unascertainable at the date of the decedent's death, it being impossible to determine how much of the principal would be diverted for the "happinesss" of the life beneficiary.

3. Apart from the regulations, it is clear under the decisions that the deduction is not allowable here. In *Humes* v. *United States*, 276 U. S. 487, the decedent had established a testamentary trust with remainders to charity that were to take effect if a prior beneficiary died without issue before reaching a specified age. This Court held that there could be no deduction because the contingencies were such as not to be capable of ascertainment as of the date of death. On the other hand, in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, there was a bequest in remainder to charity where the decedent's wife, the life tenant, was authorized to use any sum from principal "that may be necessary to suitably maintain her in as much comfort as she now enjoys." The

[6] In addition to the foregoing regulations, the Treasury Department has published a ruling which denies the deduction in a situation substantially identical with that herein. E. T. 12, 1939–2 Cum. Bull. 335.

Court ruled that since the widow's right to take corpus was not left to her discretion but was based upon an ascertainable standard "fixed in fact and capable of being stated in definite terms of money" (279 U. S. at 154), the value of the remainder could be determined with sufficient certainty to justify the deduction.

The ruling in the *Ithaca Trust* case thus shows that the deduction is allowable only where the amount which may be diverted is capable of measurement by recognized standards. In that case the amount required by the widow to maintain her "in as much comfort as she now enjoys" was susceptible of ascertainment by reference to objective existing facts, namely, her then mode of life. "It was not left to the widow's discretion" (279 U. S. at 154). In the instant case, however, the entire corpus could be invaded to satisfy the widow's "happiness," and there are no existing standards which limit the amount that could be diverted for her. Although it may be possible to make a finding as to what her *present* happiness may require, there are obviously no reliable criteria for determining what her state of mind may demand in *future* years for her happiness, and certainly the Commissioner in assessing taxes should not be required to guess. If a testator wishes to obtain a charitable deduction, it is not too much to ask that his charitable bequest be measurable with reasonable certainty, and the statute has been so

construed in the foregoing cases. The allowance of the deduction in the *Ithaca Trust* case went to the "very verge of the law" (see Magruder, J., concurring in *Gammons* v. *Hassett*, 121 F. 2d 229), and should not be extended further. The theory of that decision requires that the deduction sought herein be disallowed.

A somewhat similar situation was presented in *Robinette* v. *Helvering*, 318 U. S. 184, 188–189, where reversionary interests retained by the grantors in certain inter vivos trusts were held not to be deductible in computing gift tax because they were incapable of ascertainment by recognized actuarial methods; such retained interests, however, were deductible in the companion case, *Smith* v. *Shaughnessy*, 318 U. S. 176, where they were capable of valuation.

The decisions in the lower courts have not been entirely consistent with each other. The earlier decision of the court below in *Gammons* v. *Hassett*, 121 F. 2d 229, certiorari denied, 314 U. S. 673, is in accord with the result herein. The widow was authorized to take as much corpus as she might "need or desire"; and although the court recognized the unlikelihood of actual invasion of corpus, it denied the deduction because there was "no standard fixed in fact by which we could measure either the extent of the life tenant's desires or the likelihood of an exercise of those desires." 121 F. 2d at 233. Similar results were reached in *Knoernschild* v. *Commissioner*, 97 F.

2d 213 (C. C. A. 7th), and *Pennsylvania Co. for Insurances, Etc.* v. *Brown,* 70 F. 2d 269 (C. C. A. 3d), affirming *per curiam,* 6 F. Supp. 582 (E. D. Pa.). The Ninth and Tenth Circuits have ruled otherwise in cases which may perhaps be distinguishable upon the particular facts involved but which are nevertheless basically in conflict with the decision herein. *Commissioner* v. *Bank of America,* 133 F. 2d 753 (C. C. A. 9th); *Commissioner* v. *F. G. Bonfils Trust,* 116 F. 2d 788 (C. C. A. 10th).

II

THE CAPITAL GAIN REALIZED BY THE TRUST IS NOT DEDUCTIBLE FROM NET INCOME UNDER SECTION 162 (a) AS INCOME "WHICH PURSUANT TO THE TERMS OF THE WILL * * * IS * * * PERMANENTLY SET ASIDE" FOR CHARITABLE PURPOSES

In 1937 the estate realized capital gains from the sale of securities in the amount of $100,900.31. It seeks to avoid income tax upon those gains under Section 162 (a) which exempts trust income "which pursuant to the terms of the will * * * is * * * permanently set aside" for specified charitable purposes. The Commissioner denied such special treatment for that income, in view of the decedent's directions to the trustee to pay over such part of the trust funds to his wife as might promote her "happiness."

Our discussion in Point I, *supra,* is equally applicable to dispose of petitioner's contention on this branch of this case. Indeed, the Govern-

ment's position here is even stronger, for the statutory language makes it plain beyond reasonable dispute not only that the income must be "permanently" set aside for charitable purposes, but also that we must look only to the "terms of the will" to ascertain whether the income will so be used. There is no basis for resorting to extrinsic evidence to determine the ultimate disposition of the funds. It was for the evident purpose of avoiding any such illusive inquiry that Congress imposed the condition that the charity's right to the funds be permanently fixed by the will itself. Certainly, the income in question was not "permanently" set aside for charitable purposes "pursuant to the terms of the will," since the will explicitly subjected it to the hazards of diversion for the "happiness" of the widow.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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OCTOBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1943.

Merchants National Bank of Boston, Executor, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 15, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Ozro M. Field died in Massachusetts in 1936, leaving a gross estate of some $366,000. In his will he provided, after certain minor bequests, that the residue of his estate be held in trust, the income to go to his wife for life, and on her death all but $100,000 of the principal[1] to go "free and discharged of this trust" to certain named charities. Under the trust set up by the will, the trustee, petitioner here, was authorized to invade the corpus "at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

In 1937 the trust realized gains of $100,900.31 from the sale of securities in its portfolio.

In filing estate and income tax returns petitioner, which was also Mr. Field's executor, sought to deduct $128,276.94 from the gross estate and the $100,900.31 from the 1937 income of the trust, on the theory that those sums constituted portions of a donation to charity and were therefore deductible respectively under

[1] The $100,000 was to remain in trust, the income to go in equal shares to his three adopted children and a niece of his wife, and on the death of the last of these beneficiaries the corpus was also to go to the named charities.

§ 303(a)(3) of the Revenue Act of 1926 (44 Stat. 72)[2] and § 162(a) of the Revenue Act of 1936 (49 Stat. 1706).[3]

The commissioner disallowed the deductions and determined deficiencies of $26,290.93 in estate tax and $42,825.69 in income tax for 1937, but on the taxpayer's petition for review the Board of Tax Appeals (now the Tax Court) upheld the latter's contentions. The Court of Appeals reversed the Board of Tax Appeals, 132 F. 2d 483, and we granted certiorari because of an asserted conflict with decisions of other circuit courts[4] and this Court.[5] (319 U. S. —.)

There is no question that the remaindermen here were charities. The case, at least under § 303(a)(3), turns on whether the bequests to the charities have, as of the testator's death, a "presently ascertainable" value or, put another way, on whether, as of that time, the extent to which the widow would divert the corpus from the charities could be measured accurately.

Although Congress, in permitting estate tax deductions for charitable bequests, used the language of outright transfer, it apparently envisaged deductions in some circumstances where contingencies, not resolved at the testator's death, create the possi-

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[2] Section 303 provides:

"For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes; . . ."

[3] Section 162 provides:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes. . . ."

[4] Compare the decision below with Hartford-Connecticut Trust Co. v. Eaton, 36 F. 2d 710 (C.C.A. 2d); First National Bank of Birmingham v. Snead, 24 F. 2d 186 (C.C.A. 5th); Lucas v. Mercantile Trust Co., 43 F. 2d 39 (C.C.A. 8th); Commissioner v. Bank of America Nat'l Trust & Savings Ass'n, 133 F. 2d 753 (C.C.A. 9th); Commissioner v. F. G. Benfils Trust, 115 F. 2d 788 (C.C.A. 10th).

[5] See Ithaca Trust Co. v. United States, 279 U. S. 151.

bility that only a calculable portion of the bequest may reach ultimately its charitable destination.[6] The Treasury has long accommodated the administration of the section to the narrow leeway thus allowed to charitable donors who wished to combine some private benefaction with their charitable gifts. The limit of permissible contingencies has been blocked out in a more convenient administrative form in Treasury Regulations which provide that, where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value "presently ascertainable, and hence severable from the interest in favor of the private use,"[7] and further, to the extent that there is a power in a private donee or trustee to divert the property from the charity, "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."[8] These Regulations are appropriate implementations of §303(a)(3), and, having been in effect under successive reenactments of that provision, define the framework of the inquiry in cases of this sort. Cf. *Helvering* v. *Winmill*, 305 U. S. 79; *Taft* v. *Commissioner*, 304 U. S. 351.

Whatever may be said with respect to computing the present value of the bequest of the testator who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period, a different problem is presented by the testator who, preferring to *insure* the comfort and happiness of his private legatees, hedges his philanthropy, and permits invasion of the corpus for their benefit. At the very least a possibility that part of the principal will be used is then created, and the present value of the remainder which the charity will receive becomes less readily ascertainable. Not infrequently the standards by which the extent of permissible diversion of corpus is to be measured embrace factors which cannot be accounted for accurately by reliable statistical data and techniques. Since, therefore, neither the amount which the private beneficiary

[6] E. g., the not unusual case of a bequest of income for life intervening between the testator and the charity, requiring computation, with the aid of reliable actuarial techniques and data, of present value from future worth. Compare the provisions for charitable deductions in the Revenue Acts of 1918—§ 403(a)(3) (40 Stat. 1098); 1921—§ 403(a)(3) (42 Stat. 279); 1924—§ 303(a)(3) (43 Stat. 306); 1926—§ 303(a)(3) (44 Stat. 72).

[7] Treasury Regulations 80 (1934 ed.) Art. 44.

[8] Treasury Regulations 80 (1934 ed.) Art. 47.

will use nor the present value of the gift can be computed, deduction is not permitted. Cf. *Humes* v. *United States*, 276 U. S. 487.

For a deduction under §303(a)(3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. Cf. *Humes* v. *United States*, 276 U. S. 487, 494. Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. Cf. *Bank of America Nat'l Trust & Savings Ass'n* v. *Commissioner*, 126 F. 2d 48 (C. C. A.).

In this case the taxpayer could not sustain that burden. Decedent's will permitted invasion of the corpus of the trust for "the comfort, support, maintenance and/or happiness of my wife." It enjoined the trustee to be liberal in the matter, and to consider her "welfare, comfort and happiness" prior to the claims of residuary beneficiaries," i. e., the charities.

Under this will the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. Here, for example, her "happiness" was among the factors to be considered by the trustee. The sums which her happiness might require to be expended are of course affected by the fact that the trust income was not insubstantial and that she was sixty-seven years old with substantial independent means and no dependent children.[2] And the laws of Massachusetts may restrict the exercise of the trustee's discretion somewhat more narrowly than a liberal reading of the will would suggest, although that is doubtful. Cf. *Dana* v. *Dana*, 185 Mass. 156; and compare

[2] The Board of Tax Appeals found that decedent had adopted three children—two girls and a boy—before his marriage to the present Mrs. Field. She never adopted the children. The two girls were married to husbands fully

Sparhawk v. *Goldthwaite*, 225 Mass. 414. Indeed one might well "guess, or gamble . . ., or even insure against" the principal being expended here. Cf. *Humes* v. *United States*, *supra*. But Congress has required a more reliable measure of possible expenditures and present value than is now available for computing what the charity will receive. The salient fact is that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction.[10] This is not a "standard fixed in fact and capable of being stated in definite terms of money." Cf. *Ithaca Trust Co.* v. *United States*, *supra*. Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. We conclude that the commissioner properly disallowed the deduction for estate tax purposes.

The deduction for income tax purposes stands on no better footing. Congress permitted a deduction of that part of gross income "which pursuant to the terms of the will . . . is during the taxable year . . . permanently set aside" for charitable purposes. In view of the explicit requirement that the income be permanently set aside, there is certainly no more occasion here than in the case of the estate tax to permit deduction of sums whose ultimate charitable destination is so uncertain.

Accordingly, the decision of the Court of Appeals is

Affirmed.

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able to support them, and the boy was nearly twenty one at the testator's death.

Immediately after decedent's death the widow owned income producing property worth about $194,000. Her total income from her own property and the trust, and the amounts she has actually expended have been as follows:

Period	*Income*	*Expenditures*
1936 (7 months)	$10,735.35	$1,853.99
1937	24,738.57	10,357.91
1938	17,480.85	11,055.91
1939	17,448.23	12,024.92
1940	16,959.06	13,389.31
	$87,362.06	$48,682.04

[10] E. g., the Board found that since her husband's death, Mrs. Field purchased two automobiles and a fur coat, took two pleasure trips, gave financial assistance to a niece, helped send a grand nephew through medical school, and purchased a fur coat for one of her husband's daughters.

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1943.

Merchants National Bank of Boston, Executor, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 15, 1943.]

Mr. Justice Douglas, with whom Mr. Justice Jackson concurs, dissenting.

The Tax Court applied the correct rule of law in determining whether the gifts to charity were so uncertain as to disallow their deduction. That rule is that the deduction may be made if on the facts presented the amount of the charitable gifts are affected by "no uncertainty appreciably greater than the general uncertainty that attends human affairs." *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 154. In that event the standard fixed by the will is "capable of being stated in definite terms of money." *Id.*, p. 154. The mere possibility of invasion of the corpus is not enough to defeat the deduction. The Tax Court applied that test to these facts. 45 B. T. A. 270, 273-274. Where its findings are supported by substantial evidence they are conclusive. We may modify or reverse such a decision only if it is "not in accordance with law." 44 Stat. 110, 26 U. S. C. § 1141 (e) (i). See *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 168. The discretion to pay to the wife such principal amounts as the trustee deems proper for her "happiness" introduces of course an element of uncertainty beyond that which existed in the *Ithaca Trust Co.* case. There the trustee only had authority to withdraw from the principal and pay to the wife a sum "necessary to suitably maintain her in as much comfort as she now enjoys." But the frugality and conservatism of this New England corporate trustee, the habits and temperament of this sixty-seven year old lady, her scale of living, the nature of the investments—these facts might well make certain what on the face of the will might appear quite uncertain. We should let that factual determination of the Tax Court stand, even though we would decide differently were we the triers of fact.